NO. 90-878

IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1990

BOBBY JOE JOHNSON,

PETITIONER,

V.

STATE OF ALABAMA,

RESPONDENT.

ON PETITION FOR WRIT OF CERTIORARI
TO THE ALABAMA COURT OF CRIMINAL APPEALS

RESPONDENT'S BRIEF IN OPPOSITION TO CERTIORARI

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QUESTIONS PRESENTED FOR REVIEW

1. Whether the petition for writ of certiorari states grounds which warrant this Court's review since the petition does not present a substantial federal question, does not allege a conflict between the decision below and controlling state or federal precedent and is highly fact specific?

2. Whether this Court should deny the petition for writ of certiorari because the questions presented are not new issues to this Court and where the Petitioner has other avenues of relief available where the alleged federal questions could be more fully developed?

PARTIES

The caption contains the names of all the parties in the court below.

OPINIONS BELOW

1. On August 31, 1990, the Alabama Supreme Court denied Petitioner's petition for writ of certiorari, without opinion.

2. On March 16, 1990, the Alabama Court of Criminal Appeals entered an order affirming Petitioner's conviction, without an opinion.

3. Since Petitioner has reproduced these orders as Appendix A and C of the petition, Respondents have not duplicated that effort.

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STATEMENT OF JURISDICTION

This Court has jurisdiction pursuant to 28 U.S.C. §1257. The Alabama Supreme Court denied Petitioner's petition for writ of certiorari on August 31, 1990. The petition in this Court was filed on November 29, 1990.

CONSTITUTIONAL AND STATUTORY PROVISIONS

The petition addresses issues involving the Sixth Amendment and the Fourteenth Amendment as set out in the petition.

STATEMENT OF THE CASE

Petitioner was convicted in the Wilcox County, Alabama Circuit Court of harassing communications in violation of §13A-11-8(b), Code of Alabama 1975. The Petitioner was sentenced to sixty days in the Wilcox County, Alabama jail with all but fifty days of this sentence suspended. The Petitioner was also placed on one year of unsupervised probation.

The Alabama Supreme Court denied further review.

Since there was no opinion below, Respondents will set forth a concise statement of facts pertinent to the issue before this Honorable Court.

After the jury was struck in this case, the Petitioner's attorney made a Batson v. Kentucky, 476 U.S. 79 (1986) objection to the racial composition of the jury. (R.28-29) The Petitioner's attorney alleged that the prosecution used all twelve of its peremptory strikes to strike blacks from the jury. (R.28-30) The trial court found that this action by the prosecution provided a prima facie case of purposeful discrimination and made the state give its reasons for the strikes. (R.30-32) The state then gave the following nonracial reasons for its challenges: The Petitioner in this case was chairman of the Wilcox County Commission, an elected position. (R.34) The prosecution

had information (from David McLeod, an attorney from Wilcox County and a member of the Democratic Executive Committee in Wilcox County) that potential jurors Joseph Atwood, Willie Austin, Ralph Frazier, Ellis Perkins, and Patricia Wilson all actively supported the Petitioner in his campaign for county commissioner. (R.31-36,49-51) The prosecution struck Albert Hall, Jr., James McConnico and Edwin Snow because members of their families had warrants pending against them or had been convicted by the district attorney's office. (R.33-37,45-47) The prosecution struck Julia Zene because she was an alcoholic and struck Binnia Coleman because she knew the Petitioner and because her husband was disabled, as was the Petitioner. (R.33-36) The state struck John Gragg because he had been charged with driving under the influence and struck Larry Saulsberry because he had a brother or an uncle on the same criminal docket with the Petitioner. (R.33-36)

After the state gave its nonracial reasons for its strikes, the trial court found that all but three of the potential jurors were struck for sufficient cause. (R.56-57) The trial court found that the state did not give sufficient reasons for striking Albert Hall, Jr., Julia Zene and Edwin Snow. (R.57) The state went back over its reason for striking Edward Snow and the trial court found that the reason was sufficient for striking that juror. (R.57-60) The trial court then placed Albert Hall, Jr. and Julia Zene back on the jury and allowed the state two more strikes. (R.60-62) The state then struck Zack Williams and Michael Loftin from the jury. (R.62) The Petitioner challenged the strike of Williams and the state responded by stating that Williams knew the Petitioner. (R.62-63) The trial court allowed this strike. (R.63) The jury was then sworn in by the trial court. (R.63-64)

The state presented the following evidence at Petitioner's trial: In December 1987, Kathy Huckabee (victim) received a phone call one morning as she was making her bed. (R.72-73) Mrs. Huckabee answered the phone and a voice said, "You haven't left that good man yet?" (R.73) At first, Mrs. Huckabee thought it was a joke and said "What?" (R.73) The person on the other end of the phone then hung up. (R.73) Mrs. Huckabee described the voice on the other end of the phone as "soft and whispery" and also said that there was background music playing. (R.73) Mrs. Huckabee could tell that the voice was that of an adult male but could not tell the caller's race. (R.73)

Mrs. Huckabee received a second phone call on February 17, 1988. (R.73) The phone rang at 6:30 a.m. while Mrs. Huckabee was fixing her children's breakfast. (R.74) Mrs. Huckabee testified as follows concerning the second call:

> "I answered the phone, 'Hello.' The same background music, same soft whispery voice said, 'I'd really like to make your day.' Once again, I thought that it was a joke or something. I said, 'You don't even know who I am.' And then the voice said, 'I wonder what Billy George would say if he saw you sucking this 12-inch dick.' And really, that scared me, it alarmed me. I thought this guy really knows who I am. This guy knows me personally. By knowing, calling my husband's name and I said 'Who are you?' 'What is your name?' and the voice said, 'Mr. Big Dick.'" (R.74)

Mrs. Huckabee again asked the caller his name and the caller hung up. (R.74) This phone call scared Mrs. Huckabee. (R.75)

Mrs. Huckabee went on to work that day (at City Hall). (R.75) At work, Mrs. Huckabee told the city clerk what had happened and the city clerk told her to talk to the chief of police, Chief Hicks. (R.75) Mrs. Huckabee told Chief Hicks what had happened and he got a court order for her and put a surveillance mechanism on her phone. (R.75)

Mrs. Huckabee received a third phone call on March 24, 1988. (R.76) Mrs. Huckabee answered the phone and said "Hello" three times before she received a response. (R.76-77) After the third hello, the caller responded and said, "I still want some of that pussy." (R.77) The caller then hung up. (R.77) Mrs. Huckabee laid her phone down and went to a neighbor's house and called the phone company. (R.77) An hour later a deputy sheriff's car pulled into Mrs. Huckabee's driveway. (R.77-78)

On March 24, 1988, Thomas Agee, a central office technician with Pine Belt Phone Company in Arlington, Alabama, was instructed to run a trace on Mrs. Huckabee's phone. (R.91-92) Mr. Agee traced the phone call to telephone number 385-2194. (R.92-93) After Mr. Agee found the number he went to the phone company's index and cross-referenced the number to find who the phone was listed to.

(R.93) The phone was listed in the maintenance records under the Appellant's name. (R.93) Mr. Agee took this information to his business office and called the Sheriff's office. (R.93)

Willie Pettway of the Wilcox County Sheriff's office received a call about a harassing phone call on March 24, 1988. (R.96-97) After Deputy Pettway received this call he went to Arlington and met Mr. Huckabee. (R.97) Deputy Pettway then went to Mrs. Huckabee's house and Deputy Sheriff Evans and Mr. Agee went to the Appellant's house. (R.97) When Deputy Pettway got to Mrs. Huckabee's house he went inside and picked up her phone which was off the hook and hanging down from the wall. (R.98) Deputy Pettway talked to Deputy Evans who was at the Appellant's residence. (R.98) Deputy Evans was talking to Deputy Pettway through a telephone test set clipped onto the Appellant's telephone cable. (R.94,98)

At trial, the Appellant presented an alibi defense for the first two phone calls and testified that he misdialed a number on March 24, 1988. (R.100-104) The Appellant testified that the following occurred when he misdialed the number:

> "I was dialing before I got ready to leave home, I was making a call and I dialed a number and this person on the other end said, 'Hello.' I said, 'Oops, I'm sorry, I have the wrong number.' The person that I was calling does not talk like that. As a matter of fact, the person I called is retired. So there would be no way for her voice to sound like that. They told me that I had the wrong number and I said,'Oops, I'm sorry, I have the wrong number.' And what came across the line is, 'You're that God-dam nigger that's been calling here.' I said, 'What?' And when I said, 'What?' the line went dead." (R.104-105)

SUMMARY OF THE ARGUMENT

This Court should deny this petition for writ of certiorari since it fails to demonstrate any Rule 10 grounds for issuance of the writ where the petition does not present

a substantial federal question and does not allege that the Alabama Supreme Court's affirmance is in conflict with this Court's precedents.

The Court should also deny the writ because the questions presented are not new issues to this court and no issue of national importance is presented. Further, this Court should deny the writ because Petitioner has other avenues of relief available where the alleged federal question could be more fully developed.

ARGUMENT

I.

THE PETITION FOR WRIT OF CERTIORARI DOES NOT STATE GROUNDS WHICH WARRANT THIS COURT'S REVIEW UNDER RULE 10 SINCE THE PETITION DOES NOT PRESENT A SUBSTANTIAL FEDERAL QUESTION AND DOES NOT ALLEGE A CONFLICT BETWEEN THE DECISION BELOW AND CONTROLLING STATE OR FEDERAL PRECEDENT.

The Petitioner contends that the Alabama Court of Crimnal Appeals failed to properly examine his claim that the prosecution systematically excluded black persons from the petit jury on the basis of race in violation of Batson v. Kentucky, 476 U.S. 79 (1986), when it used all of its twelve strikes to strike black jurors from the petit jury. The Petitioner asserts that the reasons given by the prosecution for the peremptory strikes were not race neutral and therefore raise the inference that the prosecution used its peremptory strikes against the black jurors on account of their race in violation of Batson v. Kentucky.

The issue raised by Petitioner does not merit review by this Court because it does not come within the purview of this Court's Rule 10. Respondents maintain that, at most, the petition merely asks this Court to correct perceived errors in the application of a set of facts, specific solely to Petitioner, to settled precedent. While mere error correction does have a place in this Court's jurisprudence, traditionally this Court has relegated such function to a very minor role. See, e.g. Pennsylvania v. Bruder, 109 S.Ct. 205, 207-208 (1988); Florida v. Meyers, 466 U.S. 380, 383-386 (1984); Boag v. MacDougall, 454 U.S. 364,366-369 (1982). In essence, the petition in this case asserts that the Alabama Court of Criminal Appeals erred in its application of settled precedents to the facts of this case. As such, the petition fails to demonstrate that the lower court's affirmance of Petitioner's conviction is in conflict with

this Court's settled precedents. Nothing in the petition or in the trial court's holding (that there was no Batson problem) presents a "special or important" reason justifying this Court's attention. Rule 10.

The Petitioner's claim that the prosecution systematically excluded black persons from the petit jury on the basis of race is due to be analyzed in the context of this Court's holding in Batson v. Kentucky, 476 U.S. 79 (1986). In Batson, this Court held that purposeful racial discrimination in the selection of the jury venire violates a defendant's right to equal protection because it denies the defendant the protection that a trial by jury is intended to secure. This Court then stated the following:

> "The standards for assessing a prima facie case in the context of discriminatory selection of the venire have been fully articulated since Swain. See Castaneda v. Partida, supra, 430 U.S. at 494-495, 97 S.Ct., at 2048-49; Alexander v. Louisiana,

supra, 405 u.s., at 629-631; 92 S.Ct., at 1224-26. These principles support our conclusion that a defendant may establish a prima facie case of purposeful discrimination in selection of the petit jury solely on evidence concerning the prosecutor's exercise of peremptory challenges at the defendant's trial. To establish such a case, the defendant first must show that he is a member of a cognizable racial group, Castanada v. Partida, supra, 430 u.s., at 494, 97 S.Ct., at 1280, and that the prosecutor has exercised peremptory challenges to remove from the venire members of the defendant's race. Second, the defendant is entitled to rely on the fact, as to which there can be no dispute, that peremptory challenges constitute a jury selection practice that permits 'those to discriminate who are of a mind to discriminate.' Avery v. Georgia, supra, 345 U.S., at 562, 73 S.Ct., at 892. Finally, the defendant must show that these facts and any other relevant circumstances raise an inference that the prosecutor used that practice to exclude the veniremen from the petit jury on account of their race. This combination of factors in the empanelling of the petit jury, as in the selection of the venire, raises the necessary inference of purposeful discrimination.

"In deciding whether the defendant has made the requisite showing, the trial court should consider all relevant circumstances. For example, a 'pattern' of strikes against black jurors included in the particular venire might give rise to an inference of discrimination. Similarly, the prosecutor's questions and statements during voir dire examination and in exercising his challenges may support or refute an inference of discriminatory purpose. These examples are merely illustrative. We have confidence that trial judges, experienced in supervising voir dire, will be able to decide if the circumstances concerning the prosecutor's use of peremptory challenges creates a prima facie case of discrimination against black jurors.

"Once the defendant makes a prima facie showing, the burden shifts to the State to come forward with a neutral explanation for challenging black jurors. Though this requirement imposes a limitation in some cases on the full peremptory character of the historic challenge, we emphasize that the prosecutor's explanation need not rise to the level justifying exercise of a challenge for cause. See McCray v. Abrams, 750 F.2d, at 1132; Booker v.Jabe, 775 F.2d

762, 773 (CA6 1985), cert. pending 85-1028. But the prosecutor may not rebut the defendant's prima facie case of discrimination by stating merely that he challenged jurors of the defendant's race on the assumption - or his intuitive judgment - that they would be partial to the defendant because of their shared race. Cf. Norris v. Alabama, 294 U.S., at 598-599, 55 S.Ct., at 583-84; see Thompson v. United States, ___ U.S. __ , ___, 105 S.Ct. 443, 444, 83 L.Ed.2d 369 (BRENNAN, J., dissenting from denial of certiorari). Just as the Equal Protection Clause forbids the States to exclude black persons from the venire on the assumption that blacks as a group are unqualified to serve as jurors, supra, at 5, so it forbids the States to strike black veniremen on the assumption that they will be biased in a particular case simply because the defendant is black. The core guarantee of equal protection, ensuring citizens that their State will not discriminate on account of race, would be meaningless, were we to approve the exclusion of jurors on the basis of such assumptions, which arise solely from the jurors' race. Nor may the prosecutor rebut the defendant's case merely by denying that he had a discriminatory motive or

> 'affirming his good faith in individual selections.' Alexander v. Louisiana, 405 U.S., at 632, 92 S.Ct., at 1226. If these general assertions were accepted as rebutting a defendant's prima facie case, the Equal Protection Clause 'would be but a vain and illusory requirement.' Norris v. Alabama, supra, 294 U.S. at 598, 55 S.Ct., at 583-84. The prosecutor therefore must articulate a neutral explanation related to the particular case to be tried. The trial court then will have the duty to determine if the defendant has established purposeful discrimination." (footnotes omitted)

476 U.S. at 96-98.

In the instant case, the prosecutor used all of its twelve strikes to strike blacks. (R.29) The trial court found that this action by the State provided a prima facie case of purposeful discrimination and made the State give its reasons for the strikes. (R.30-33) The State then gave the following nonracial reasons for its challenges: The Petitioner in this case was chairman of the Wilcox County Commission, an elected

position. (R.34) The prosecutor had information (from David McLeod, an attorney from Wilcox County and a member of the Democratic Executive Committee in Wilcox County) that potential jurors Joseph Atwood, Willie Austin, Ralph Frazier, Ellis Perkins and Patricia Wilson all actively supported the Petitioner in his campaign for county commissioner. (R.33-36,49-51) The prosecution struck Albert Hall, Jr., James McConnico and Edwin Snow because members of their family had warrants pending against them or had been convicted by the D.A.'s Office. (R.33-36) The prosecution struck Julia Zene because she was an alcoholic and struck Binnia Coleman because she knew the Petitioner and because her husband was disabled, as was the Petitioner. (R.33-36) The State struck John Gragg because he had been charged with driving under the influence and struck Larry Saulsberry because he had a brother or an

uncle on the same criminal docket with the Petitioner. (R.33-36)

After the State gave its nonracial reasons for its strikes, the trial court found that all but three of the potential jurors were struck for sufficient cause. (R.56-57) The trial court found that the State did not give sufficient reasons for striking Albert Hall, Jr., Julia Zene and Edwin Snow. (R.57) The State went back over its reason for striking Edwin Snow and the trial court found the reason sufficient. (R.57-60) The trial court then placed Albert Hall, Jr. and Julia Zene back on the jury and allowed the State two more strikes. (R.60-62) The State struck Zack Williams and Michael Loftin from the jury. (R.62) The Petitioner challenged the strike of Williams and the State responded by stating that Williams knew the Petitioner. (R.62-63) The trial court allowed this strike. (R.63)

In the instant case, the State set forth valid nonracial reasons for its strikes. The prosecution stated that the Petitioner was an elected official and that it struck five of the potential jurors because they had actively supported the Petitioner in his campaign for county commissioner. The Petitioner contends that since the prosecution did not ask these five jurors or any of the white jurors as to whether they supported the Petitioner in his campaign that this raised an inference that the prosecution used its peremptory strikes against the black jurors on account of their race. There is nothing in Batson which would require the prosecution to question all of the potential jurors about their political support of the Petitioner. It is enough that the prosecution had knowledge of the political support these five jurors gave to the Petitioner. As this Court stated in Batson, the prosecution's explanation for striking a

juror need not rise to the level justifying exercise of a challenge for cause. It is clear that the jurors who actively supported the Petitioner's campaign for county commissioner could have had a bias in favor of the Petitioner, therefore, the prosecution articulated a neutral explanation for her strikes of potential jurors Joseph Atwood, Willie Austin, Ralph Frazier, Ellis Perkins and Patricia Wilson.

The prosecution struck Albert Hall, Jr., James McConnico, and Edwin Snow because members of their families had warrants pending against them or had been convicted by the District Attorney's office. The Petitioner asserts that this was not a valid reason for striking these jurors because it had no relevance to the Petitioner's case. However, it is clear that this is a valid and relevant reason for striking potential jurors in all criminal cases. The potential bias of a juror

who has had family members with warrants pending against them or prior convictions from the District Attorney's Office is clear. Therefore, it was not error for the prosecution to strike these jurors and the strikes were relevant to the Petitioner's case. The prosecution also struck potential jurors Julia Zene and Binnia Coleman. Julia Zene was struck because she was an alcoholic and the prosecution struck Binnia Coleman because she knew the Petitioner and because her husband was disabled, as was the Petitioner. The trial court found that the State's reason for striking Julia Zene was not relevant and placed her back on the jury. The trial court, however, thought that the strike of Binnia Coleman was relevant. It is clear that potential juror Coleman could have been biased in favor of the Petitioner since her husband, like the Petitioner, was disabled. The State was therefore justified in striking Binnia Coleman from the jury.

The prosecution struck potential juror John Gragg because he had been charged with driving under the influence and failed to acknowledge this fact when the general question was asked to the jury panel about prior charges against them. The prosecution struck potential juror Larry Saulsberry because he had a brother or an uncle on the same criminal docket with the Petitioner. Once again, the Petitioner asserts that these reasons were not relevant to the Petitioner's case. These reasons, however, were relevant to the Petitioner's case. Potential juror John Gragg was not honest about a prior criminal charge. This dishonesty was certainly relevant to who the prosecution would want on its petit jury. The State also properly struck potential juror Larry Saulsberry who had a family member (uncle or brother) on the same criminal docket with the Petitioner. Obviously, this person could be biased against the prosecution who was going

to prosecute a family member at the same time the Petitioner was being prosecuted.

It is clear from what is set forth above that the State set forth valid nonracial reasons for its strikes which were reasonably related to the Petitioner's case. Further, the trial court did not accept two of the prosecution's strikes and reinstated those jurors on the Petitioner's jury. The State set forth valid nonracial reasons for ten of its strikes and the trial court reinstated the two jurors which it felt were struck based on race, therefore, the trial court did not err when it denied Petitioner's Batson motion. This Court should therefore deny this petition for writ of certiorari.

II.

THIS COURT SHOULD DISMISS THE PETITION FOR WRIT OF CERTIORARI BECAUSE THE QUESTION PRESENTED IS NOT A NEW ISSUE TO THIS COURT AND WHERE THE PETITIONER HAS OTHER AVENUES OF RELIEF AVAILABLE WHERE THE ALLEGED FEDERAL QUESTION COULD BE MORE FULLY DEVELOPED.

The issue raised by Petitioner, that the prosecution systematically excluded black persons from the petit jury on the basis of race in violation of Batson v. Kentucky, 476 U.S. 79 (1986), is not a new issue to this Court. Since the petition does not request this Court to overrule or modify well settled law in these areas, the petition amounts to nothing more than a request to correct perceived errors of the application of facts to settled law. Given this Court's limited time and resources, this Court should refuse to grant the writ in a case such as this one where no issue of national importance is presented, where no request is made to overrule or modify this Court's

precedents, and where this Court will be required to review the trial transcript since there were no opinions rendered by the court's below.

Further, this Court should deny this petition so that Petitioner can pursue other avenues of relief available to him in order to more fully develop the alleged federal questions. In this case, there are no opinions below for this Court to consider because the Alabama Supreme Court denied the Petitioner's petition for writ of certiorari without opinion and the Alabama Court of Criminal Appeals affirmed the conviction without opinion. Should this Court grant the petition for certiorari in this case, it would have to go to the trial transcript to determine the merits of the questions presented. It would be more expedient for this Court to dismiss the petition and allow the Petitioner to file a 42 U.S.C. §2254

action and have the lower federal courts develop a record and determine whether the Petitioner has presented federal questions for this Court to consider. This would give this Court opinions to reach its decision from rather than take this Court's time and effort to search through a state trial transcript. Therefore, this Court should deny the petition for writ of certiorari.

CONCLUSION

Respondents respectfully submit that this Court should deny the petition for writ of certiorari since the petition does not present a substantial federal question, does not allege a conflict between the decision below and controlling state or federal precedent and is highly fact specific.

Respectfully submitted,

JAMES H. EVANS
ATTORNEY GENERAL
BY:

_____
P. DAVID BJURBERG
ASSISTANT ATTORNEY GENERAL

CERTIFICATE OF SERVICE

I, P. David Bjurberg, Assistant Attorney General of Alabama, a member of the Bar of the Supreme Court of the United States and one of the Attorneys for the State of Alabama, Respondent, hereby certify that on this 1st day of March, 1991, I did serve the requisite number of briefs of the foregoing on the attorney for the Petitioner, by placing the same in the United States Mail, first class, postage prepaid and addressed as follows:

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